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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of the Commission's)
Rules to Establish New)
Personal Communications Services)

GEN Docket No. 90-314

To: The Commission

MOTION TO STRIKE

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys, requests that the Commission strike the "Petition for Reconsideration" (the "Petition") filed by Advanced Cordless Technologies, Inc. ("ACT") on March 7, 1994 in the above-referenced docket. As explained in more detail below, the ACT Petition does not meet the Commission's minimum requirements for reconsideration petitions for two reasons: (1) it exceeds the Commission's maximum page length of 25 pages, and (2) it contains accusations of conspiracy and rule violations so illogical and so lacking in factual support as to make the petition patently offensive to the Commission's rulemaking process.

DISCUSSION

I. The ACT Petition Exceeds the Commission's Established Page Limit.

The Commission's rules plainly state that petitions for reconsideration of rulemaking orders "shall not exceed 25 double-spaced pages." 47 C.F.R. §1.429(d). The text of the ACT Petition is 29 pages. ACT has not requested a waiver of the Commission's length of pleadings rules, as required by 47 C.F.R. §1.48(b). Under these circumstances, the ACT Petition must be "returned without consideration." 47 C.F.R. §1.48(a).

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II. The Filing of the ACT Petition Was an Abuse of Process.

Although the ACT Petition wildly and in only the vaguest of terms accuses the three PCS pioneer's preference holders and the Commission's staff of violating the ex parte rules, and conspiring to do so, its authors were apparently more concerned with being cute than with being clear and accurate. The Petition, even if taken at face value, does not support the allegation that any of the Commission's current rules were violated. Quite literally, there is nothing in the Petition for the Commission to reconsider.

As best as Omnipoint can decipher, the issues that ACT complains of are: (1) Omnipoint failed to comply with 47 C.F.R. §1.1206(a)(2); (2) Omnipoint must have had discussions with the Commission's staff on the merits of its preference request, a restricted matter; and (3) the Commission's staff failed to enforce the ex parte rules at these discussions.¹ The first accusation misstates the law and the second and third accusations are made without any factual support. Each accusation will be discussed in turn.

First, ACT has misstated the Commission's rule concerning oral ex parte presentations. Section 1.1206(a)(2) states:

Any person who in making an oral ex parte presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary . . . (emphasis added)

ACT believes this rule "require[s] that a written report be filed concerning contacts that are made."² Based on this patent misunderstanding, ACT claims that Omnipoint's notices of ex parte contacts are improper because the notices referred to previously filed pleadings and did not specifically set out the details of the discussion. As shown by the rule quoted (not paraphrased) above, Omnipoint was under no legal obligation to set out discussion points that were already explained in its prior written pleadings. All interested parties had open access to those written pleadings and a full opportunity to respond to the arguments contained therein. Therefore, there is no reason for the Commission to initiate a reconsideration proceeding in order to convince ACT of the plain language of the ex parte rules.

Moving from the frivolous to the paranoid, ACT's second "problem" is that Omnipoint did not reveal what actually was discussed at the ex parte meetings. ACT is convinced that what really happened was that Omnipoint discussed the merits of its pioneer's preference request with the Commission's staff and then, in its ex parte notice, lied about only discussing non-restricted

¹ Given that ACT's claims can be summarized in a single sentence, Omnipoint's motion to strike for exceeding the page limit is all the more compelling.

² Petition at 25.

issues.³ Omnipoint did not discuss any restricted issues and did not violate any ex parte rules. ACT offers absolutely no evidence, not even a rumor, to substantiate its slanderous claims.⁴

The Commission's rules mandate that such abusive pleadings not be tolerated.⁵ As the Commission explained in Harrea Broadcasters, Inc., "[a]t the very least, complaints to the Commission, regardless of label, should contain 'specific factual allegations which would warrant grant of the relief requested'."⁶ ACT's allegations are totally without any factual support, it merely hypothesizes that something must have occurred, which Omnipoint failed to report. Speculative pleading to this extreme is an affront to the Commission's reconsideration process and, for that reason alone, the Commission should dismiss the ACT Petition.⁷

Finally, ACT argues that the Commission's staff itself failed to enforce the ex parte rules when Omnipoint allegedly discussed the merits of its preference request. In full, ACT hypothesizes that Omnipoint discussed the merits of its preference request with the Commission's staff, lied about that in its ex parte notice to the Commission, and then the Commission's staff, having received Omnipoint's notice, did nothing about it. Once again, ACT offers absolutely no evidence to substantiate its claim. Not only are these accusations an abuse of process for the reasons stated in the previous paragraph, they are scandalous and insipid. In City of New York Municipal Broadcasting System,⁸ the Commission explained that wholly unsupported allegations of ex parte violations by the Commission's staff are scandalous and violate 47 C.F.R. §1.52. In that case, the counsel submitting the scandalous pleading narrowly escaped disciplinary action.⁹ ACT's allegations are equally scandalous and without factual support. At a minimum, the ACT pleading should be stricken in order to preserve the integrity of the Commission's staff.

³ The Commission has plainly stated that ET Docket No. 93-266 was a nonrestricted proceeding and that ex parte contacts were permissible. Notice of Proposed Rulemaking, ET Docket No. 93-266, 8 FCC Rcd. 7692, at ¶23 (1993). Omnipoint, like all other interested parties, was entitled to make ex parte contacts pursuant to the Commission's rules.

⁴ ACT's entire position on ex parte contacts is truly bizarre. In one part of its Petition, ACT argues that Omnipoint should have filed more detailed ex parte notices, while in another part it argues that Omnipoint lied when it filed ex parte notices. One wonders how more detailed notices would have soothed ACT's paranoid visions of lying and conspiracy.

⁵ ACT's abusive petition violates the requirement of 47 C.F.R. §1.52 that parties' claims be well grounded in fact and 47 C.F.R. §1.429(b), which requires reconsideration petitions to be based on facts.

⁶ 33 RR 2d 1075, 1080, (1975), *quoting*, Midland Broadcasters, Inc., 48 F.C.C. 2d 195, 196 (1974).

⁷ *See* KQED, 77 F.C.C. 2d 973, 974 (1980) (Commission dismisses pleading where no specific allegations of factual material are offered that would warrant the relief requested).

⁸ 38 RR 2d 1058 (1976).

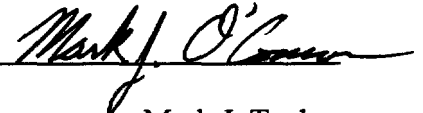
⁹ *See* City of New York Municipal Broadcasting System, 39 RR 2d 102 (1976).

CONCLUSION

ACT's Petition clearly crosses the line dividing advocacy and abuse. It shows no regard for even the simplest of the Commission's rules -- page limits. It relies on a patent misstatement of the law and pure hyperbole as the grounds for requesting a rescission of Omnipoint's final preference award. It attacks the integrity of the Commission itself. Because these abusive practices cannot, as a matter of law, form the basis of a reconsideration proceeding, Omnipoint respectfully requests that the Commission strike the ACT Petition from this docket.

Respectfully submitted,

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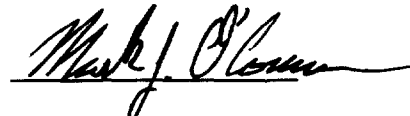
Its Attorneys

Date: March 31, 1994

CERTIFICATE OF SERVICE

I, Mark J. O'Connor, certify that on this day, March 31, 1994, a copy of the attached "Motion to Strike" was sent via first-class mail, postage pre-paid, to the following party:

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